STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION
Case #: FOF - 160651

[redacted]

Pursuant to a petition filed September 23, 2014, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of Inspector General to disqualify [redacted] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on December 2, 2014, at Milwaukee, Wisconsin

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. On April 18, 2014, a person listed as [redacted] ([redacted]) responded to an offer on Facebook to sell foodstamps, by posting the response, “wats ur mumber?il take m 4 sure”. (Exhibit 5)

2. [redacted] and the Respondent have the same first name. (Exhibit 5)

3. [redacted] listed [redacted] ([redacted] and [redacted] ([redacted]) as family members, but does not specify how they are related. (Id.)

4. A Case Member History printout from CARES lists the Respondent, [redacted] and [redacted] as has having been members of the same household in 2013. (Exhibit 5)

5. On September 23, 2014, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that on an unspecified date the Respondent attempted to traffic FoodShare benefits on-line. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

> If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*
>
> *Emphasis added*

This hearing was originally scheduled to take place on November 4, 2014. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at 3635 N. 4th St. The Respondent did not appear for the hearing on November 4, 2014. However, she was clearly aware of the hearing because she called later that same day and left a message that she did not have working phone, but that she could be reached at her aunt's home. An attempt was made to contact the Respondent at her aunt's home, but she had left the residence. A message was left for the Respondent with her aunt.

The hearing was rescheduled to December 2, 2014. The Division of Hearings and Appeals sent the Respondent a notice advising her of the date and time of the hearing. Two attempts were made to contact the Respondent at her aunt's home, without success. Consequently, the hearing took place without the Respondent.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her non-appearance.

What is an IPV?

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook,* § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household.

Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

What is OIG's burden of Proof?

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

> Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. …
>
> *Kuehn*, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

> Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992.

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that it is true.

OIG's claim

This case deals with an allegation of trafficking. Under 7 CFR §271.2, trafficking means:

> (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;
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> (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
>
> (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount;
>
> (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
>
> (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.
>
> (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

This definition became effective November 19, 2013.[1] The previous definition of trafficking did not include attempted trafficking.

More specifically, OIG alleges that the Respondent attempted to traffic / purchase FoodShare benefits, based upon a Facebook response to an offer to sell food stamps. The specific post reads, "wats ur mumber?il take m 4 sure" . Ms. Stankey claimed the post was dated April 18, 2014, though no year is indicated on the post. OIG provided no other evidence of attempted trafficking - no changes in EBT usage patterns, no continued dialogue regarding the

[1] https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations

sale of food stamps establishing a place to meet and method of sale, and no testimony from anyone who might have witnessed the Respondent's attempt to purchase Foodstamps.

The Definition of "Attempt"

The Federal Registrar addressing the amendment to the trafficking definition indicates that "attempt" consists of the "intent to do an act, an overt action beyond mere preparation, and the failure to complete the act." Fed. Register Vol. 79, No. 162, pg. 51655[2] This is consistent with the standards for establishing attempt promulgated by the Wisconsin legislature, the Wisconsin courts and the Federal courts.

Wis. Stats. §939.32(3) states that, "An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor."

The Wisconsin Court of Appeals in State v. Henthorn, 281 Wis.2d 526, 518 N.W.2d 544 (Wis. App. 1998) restated the holding by the Wisconsin Supreme Court in Hamiel v. State, 92 Wis.2d 656, 666, 285 N.W.2d, that, "[I]t must … be shown that: (1) the defendant's actions in furtherance of the crime clearly demonstrate, under the circumstances that he [or she] had the requisite intent to commit the crime ...; and (2) that having formed such intent the defendant had taken sufficient steps in furtherance of the crime so that it was improbable that he [or she] would have voluntarily terminated his [or her] participation in the commission of the crime."

The Federal Courts have dealt with establishing standards for determining when one has attempted to violate the law, as follows:

"As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct…Not only does the word 'attempt' as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements." U.S. v. Resendiz-Ponce, 549 U.S.102, 127 S.Ct. 782, 107 (2007)

The Seventh Circuit Court of Appeals[3] in U.S. v. Sanchez, 615 F.3d 836, 843 and 844 (7th Cir. 2010) followed this standard, stating that one must not only show an intent to violate the law, but also that the defendant took a substantial step toward completing the crime. The Court of Appeals further stated that, "a substantial step is 'some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime'….and that it is 'something more than mere preparation, but less than the last act necessary before the actual commission of the substantive crime'…The line between mere preparation is inherently fact specific; conduct that would appear to mere preparation in one case might qualify as a substantial step in another."[4]

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[2] *See https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations#h-13*

[3] Wisconsin is in the 7th Federal Judicial Circuit and as such, holdings from the 7th Circuit Court of Appeals are binding.

[4] The Court of Appeals cited to *United States v. Manley,* 632 F.2d 978, 988 (2d Cir. 1980), *United States v. Rovetuso,* 768 F.2d 809, 821 (7th Cir.1985), *United States v. Barnes,* 230 F.3d 311, 315 (7th Cir.2000) and *United States v. Magana,* 118 F.3d 1173, 1199 (7th Cir.1997).

OIG argues that there should be no reliance upon Federal and State criminal codes/cases to define attempt for administrative disqualification procedures, but does not offer any legal basis for this argument. Perhaps OIG is confusing the task of defining an act with the burden of proof to show the act occurred. These are two different things.

However, as discussed above, the Federal Register discussing the legislative history behind the amendment to the trafficking definition stated that attempt requires 1) an intent to do an act, 2) an overt action beyond mere preparation, and 3) the failure to complete the act. This is the same definition established by the Federal Courts in criminal attempt matters.

Further, trafficking / attempted trafficking can be prosecuted as a crime under both Federal and Wisconsin statutes. *See 7 CFR §271.5; 7 CFR §273.16(a), 7 CFR §273.16 (b)(2), 7 CFR §273.16 (4) and 7 U.S.C. Sections 2024(b) and (c). See also Wis. Stats. §942.92(3)* In addition, an IPV can be proven by a conviction. *7 CFR §273.16 and FoodShare Wisconsin Handbook,* § 3.14.1 As such, it is reasonable and necessary to apply the same definition of "attempt" that has been established by both the legislatures and the courts.

The Merits of OIG's claim

It is difficult to conclude that a single post, responding to an offer to sell food stamps, consisting of the words, "wats ur mumber?I'll take em 4 sure" is clear and convincing evidence of both an intent to purchase food stamps and an overt act beyond mere preparation to commit the offense.

Indeed, there is no indication that the individual offering to sell food stamps, ever provided the Respondent with his phone number so that the Respondent could call him and make further arrangements to purchase the food stamps. There is no indication in the Facebook post that the Respondent took steps beyond this inquiry and OIG has not provided any evidence of any overt act committed by the Respondent in furtherance of food stamp trafficking.

In addition, the evidence linking the aforementioned Facebook post by [redacted] to the Respondent is thin. The evidence relied on is that [redacted] and the Respondent have the same first name and that [redacted] has relatives that used to be in the same household as the Respondent and might well be related to the Respondent. This isn't much, given that it is not unheard of for families to have two individuals with the same first name, especially if it is a favored name in that family.

Based upon the record before me, I find that that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the FoodShare program rules by attempting to traffic benefits on-line.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the FoodShare program rules by attempting to traffic FoodShare benefits online.

NOW, THEREFORE, it is **ORDERED**

That IPV case number [redacted] is hereby reversed and that OIG cease enforcement efforts.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause

for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee, Wisconsin, this 15th day of December, 2014.

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Nadine Stankey - email

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The preceding decision was sent to the following parties on December 15, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
NadineE.Stankey@wisconsin.gov